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FILED
JUN 15 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1317

CARLO GAMBINO,

Petitioner,

—v.—

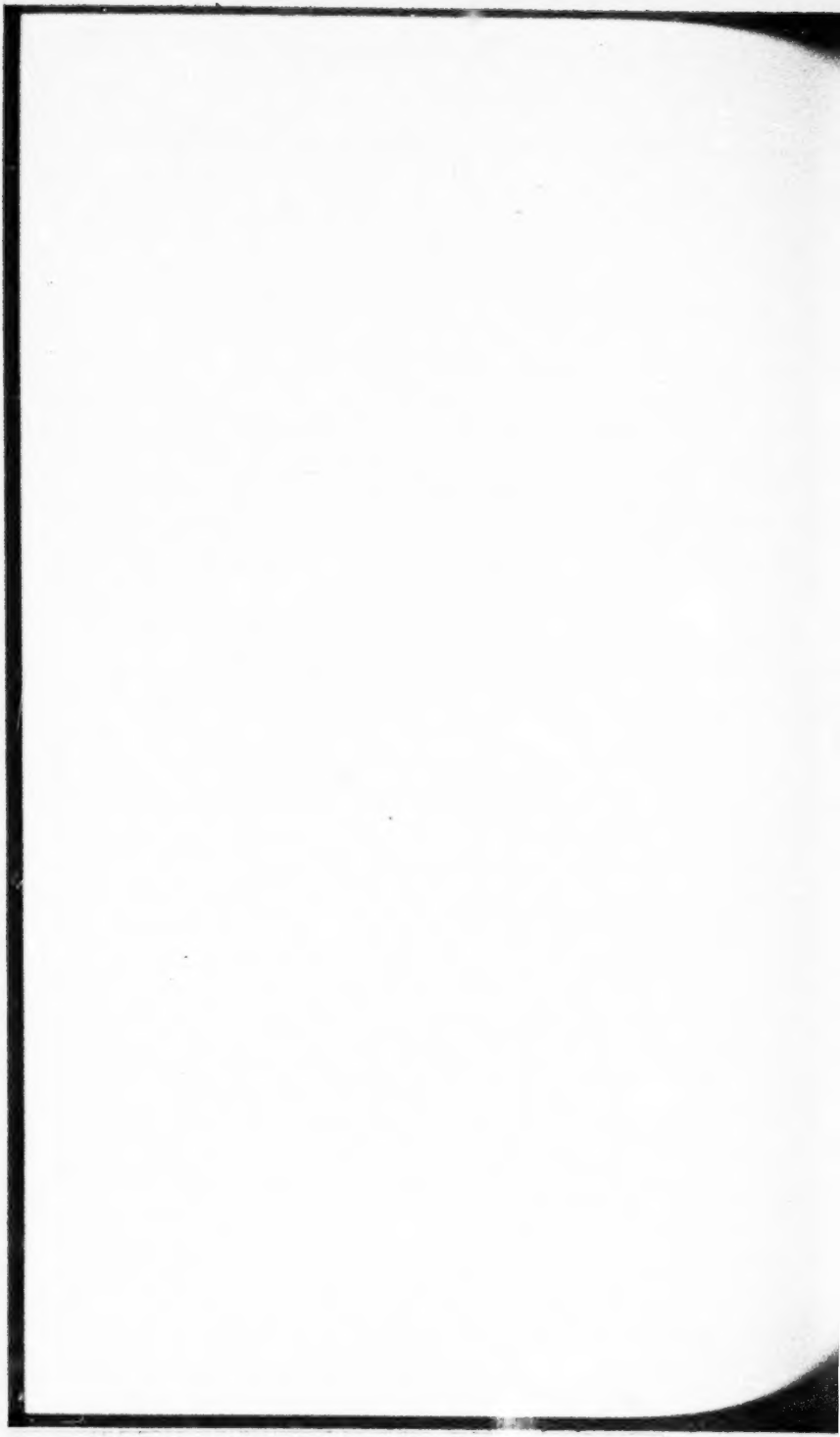
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

REPLY BRIEF FOR PETITIONER

EDWARD J. ENNIS
Attorney for Petitioner
8 West 40th Street
New York, N. Y. 10018

STANLEY N. ZWAIK
Of Counsel



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A clarification of the issues may be aided by brief comment on several statements in the Government's Brief in Opposition:

1. *Deportability As A Stowaway.* The first question is not, as the Government incorrectly states (Br. 2, 7), whether petitioner's "excursion" to Canada in 1935 made him a lawful permanent resident. The Government well knows that petitioner has never claimed to be a "lawful permanent resident" which is a clearly defined status under the immigration laws and which can be achieved only by entry as a lawful permanent resident or acquisition of lawful permanent residence after entry under the relevant statutory provisions for suspension of deportation, adjustment of status, or record of admission (Sections 101(a)(20), 244, 245 and 249 of the Immigration and Nationality Act

of 1952, 8 U.S.C. Sections 1101(a)(20), 1254, 1255 and 1259). Lawful permanent residence has the important consequences that the alien is free to go abroad and return and may apply for naturalization (Section 316(a) of the 1952 Act, 8 U.S.C. 1427).

Petitioner claims only that he is not deportable for his stowaway entry in 1921 because his departure to Canada in 1935, wholly apart from his return from Canada to his actual residence in the United States, terminated his stowaway status in the United States. Under the administration of the immigration laws numerous aliens are in the United States who have not acquired lawful permanent residence and yet are not deportable under any one of the statutory grounds of deportation or their deportation has been withheld under statutory authority (Section 243(h) of the 1952 Act, 8 U.S.C. 1253) which recognizes the presence of aliens in the United States who do not have lawful permanent residence and are not deportable. The Government's assertion that petitioner claims lawful residence or in any way bases his claim of non-deportability as a stowaway upon his reentry from Canada, rather than merely upon his departure from the United States to Canada, is unnecessarily confusing.

Similarly the Government would again confuse the issue by attributing to petitioner a contention not made on his behalf that readmission from Canada "wipe[d] the slate clean" (Br. 7). Petitioner of course makes no such contention but, as a fairer quotation from the petition shows, contends that "Departure wipes the slate clean * * *" (Pet. 7). The Government's misstatement of petitioner's contention requires repetition of petitioner's position (Pet. 9) that "departure from the United States, *wholly apart from his reentry*, terminated his status a stowaway * * *". There is no authorative support for the Government's con-

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tention, repeating the unsupported statement of the Board of Immigration Appeals herein, that a nonsuccessful applicant for a visa in Canada resumes his prior status upon return (Br. 7). The statute and regulations are entirely silent on this point (Pet. 8) and in the absence of an affirmative regulatory provision departure from the United States wipes out prior status as a stowaway. This is the petitioner's contention on this point.

The Government also states that the Special Inquiry Officer and the Board of Immigration Appeals "noted" that petitioner is deportable on the wholly separate ground lodged at the hearing, but not relied on in the order of deportation based solely on the stowaway charge, that on petitioner's reentry from Canada he was excludable as an immigrant without an immigration visa and therefore deportable (Br. 8). But the Government fails to add that despite references by the administrative agencies charged with administration of the deportation laws to this possible additional charge of deportation they deliberately, in the exercise of their administrative authority, placed the deportation order only on the stowaway ground (Pet. 16a, 31a). The only ground reviewed by the court below was the stowaway ground (Pet. 3a) and appellate review was limited by statute to the "final order of deportation" made in the case (Sec. 106(a) of the 1952 Act, 8 U.S.C. 1105a). In the court below the Government in its brief, as in the Government's brief in opposition here, also stated that the petitioner was also presumably deportable on this additional ground of lack of an immigration visa on return from Canada. Petitioner replied below, as he replies here, that the Special Inquiry Officer and the Board of Immigration Appeals deliberately and affirmatively chose not to place the deportation order on this ground which was not presented for review and was not reviewed by the court below. The Government's repeated reference to this addi-

tional available ground of deportation which was not relied upon as a basis for the deportation order can have no other purpose than to prejudice the review here sought of the stowaway ground of deportation and of course should receive no favorable consideration by this Court.

2. *Section 241(f) Prohibits Deportation.* The Government inaccurately states petitioner's contention to be that stowing away is a "fraud of sorts and should therefore be deemed within the section's spirit" (Br. 10). Petitioner's contention really is that stowing away is actual and legal fraud and precisely within the words of the section which excuses deportation on the ground of excludability for entry by fraud or misrepresentation as well as for entry as an alien who sought to procure or procured a visa or other documentation by fraud or misrepresentation. In *Errico* and *Scott* the Government conceded (385 U.S. at 217) and this Court held that the similarity of language in Section 241(f) to the language in Section 212(a)(19) did not limit Section 241(f) to cases of exclusion under Subdivision 19 but included exclusion under Subdivision 3 of Section 212(a). There is no reason either in logic or statutory history not to apply Section 241(f) to cases of persons excludable under Subdivision 18 as stowaways if in fact stowing away is entry by fraud or misrepresentation as petitioner claims.

The Government speculates (Br. 13 ft. 8) that reference in the legislative history to laxity of Mexican border controls which permitted illegal entrants could refer to lax screening at entry points and not "necessarily refer to surreptitious entrants." But this Court's reference to this legislative history comments that it has been far easier to enter illegally over our common land border with Mexico than from countries without a common land border (385 U.S. at 224). This certainly does not contemplate merely

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lax screening at border stations but includes surreptitious entry elsewhere on the border. In view of the humanitarian reach of the statute there is no reason to exclude stowaways if entry as a stowaway is entry by fraud and misrepresentation as petitioner claims and the Government does not seriously deny.

In view of the electronic surveillance of petitioner first revealed in the Government's brief (p. 14) this case is not ripe for determination of the correctness of denial of discretionary relief. If the petition is granted and petitioner's position sustained either on the ground that he is not deportable as a stowaway or that Section 241(f) bars deportation no occasion arises for a remand and a hearing to determine whether illegally obtained information was a basis of the questions petitioner refused to answer. If the deportation order is sustained the case could then be remanded for further proceedings in respect of the requested discretionary relief. The alternative is to remand the case now for further proceedings. *Black* v. *United States,* 385 U.S. 26; *United States Ex Rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 155.

The petitioner submits that the petition should be granted and the questions of law presented should be determined and the legal effect of electronic surveillance should be considered later only if it becomes necessary to do so.

Respectfully submitted,

EDWARD J. ENNIS
Attorney for Petitioner
8 West 40th Street
New York, N. Y. 10018

STANLEY N. ZWAIK
Of Counsel